STATE OF MICHIGAN

COURT OF APPEALS

UNITED ELECTRIC SUPPLY COMPANY, INC, Plaintiff-Appellant,	UNPUBLISHED March 13, 2008
v	No. 276290 Kent Circuit Court
TERHORST & RINZEMA CONSTRUCTION COMPANY, Defendant-Appellee.	LC No. 04-12169-CZ

Before: Fitzgerald, P.J., and Smolenski and Beckering, JJ.

PER CURIAM.

Plaintiff appeals of right an order denying plaintiff's "Motion to Reconsider, Amend, and/or Give Relief" from an order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant.[1] We affirm.

Plaintiff filed its complaint on December 14, 2004, bringing claims for violation of the public works bond statute, MCL 129.201 *et seq.*, and unjust enrichment.[2] Plaintiff alleged that it supplied electrical material to Pro-Tech Alarm and Electric, which is not a party to this cause of action. Pro-Tech was a subcontractor of defendant, TerHorst & Rinzema Construction Company, which was the general contractor on a project known as the Ottawa County FIA Tenant Build Out for which defendant was general contractor. There is no dispute that defendant did not provide payment and performance bonds for the project.

Defendant moved for summary disposition, asserting that a private cause of action does not exist under MCL 129.201 for failure to provide payment and performance bonds. Defendant also asserted that an implied contract theory of unjust enrichment could not exist because an

[1] Although defendant brought its motion for summary disposition under MCR 2.116(C)(8), documentary evidence was presented to the trial court. Thus, we assume that the trial court granted summary disposition under MCR 2.116(C)(10).

[2] Defendant did not file an answer to the complaint but filed a motion for summary disposition on December 29, 2004.

express contract existed between plaintiff and Pro-Tech.[3] Defendant further asserted that it was not unjustly enriched because the funds to be paid to Pro-Tech for its services and materials were paid to the contractor that replaced Pro-Tech.[4]

At the conclusion of a hearing on the motion for summary disposition on February 4, 2005, the trial court reserved decision on the matter and requested that the parties file supplemental briefs as to whether a private cause of action existed under MCL 129.201 and whether plaintiff complied with the notice requirements of MCL 129.207.

On March 2, 2005, defendant deposed Terry Newkirk, plaintiff's president, general manager, and part owner. On March 14, 2005, defendant filed its supplemental brief in support of its motion for summary disposition, including the deposition of Terry Newkirk. Newkirk testified that Pro-Tech supplied electrical material to defendant between February 26, 2004, and June 30, 2004.[5] He also testified that defendant entered into a separate agreement with plaintiff to provide the remainder of the electrical materials necessary to finish the project and that plaintiff was paid in full under that agreement. Defendant also asserted that plaintiff did not comply with the 30- and 90- day notice requirements in MCL 129.207.

On April 5, 2005, plaintiff filed an answer to defendant's supplemental brief indicating that it would further supplement its response after reviewing defendant's corporate records and deposing defendant's owner.[6] Plaintiff failed to further supplement its response.

No further action occurred in this case until November 8, 2006, when the trial court issued a notice to appear for a scheduling conference. On December 15, 2006, the trial court issued its scheduling order pursuant to the parties' stipulated scheduling order. On December 26, 2006, the court received a letter from defendant's counsel reminding the court of the pending summary disposition motion. On January 4, 2007, the trial court issued its order granting defendant's motion for summary disposition, stating in part:

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[3] Plaintiff did not allege that it had an express contract with Pro-tech but, rather, that it supplied materials to Pro-Tech for the project. However, Attachment D to the complaint contains a letter from plaintiff's counsel to defendant dated November 17, 2004, acknowledging a contract between plaintiff and Pro-Tech. The record, however, does not contain a copy of any contracts between plaintiff and Pro-Tech.

[4] Although it is not clear from the record, it appears that Pro-Tech did not complete its performance under the contract and that defendant had to hire another contractor to complete the job that Pro-Tech contracted to perform.

[5] These dates are also supported by an accounts receivable aging report from plaintiff attached as Attachment 2 to defendant's supplemental brief.

[6] Plaintiff deposed defendant's owner, Randall TerHorst, on May 24, 2005, but did not reference the deposition in any pleadings before the trial court's January 4, 2007, order, and never moved to admit the deposition transcript into evidence.

> Because plaintiff has never responded to defendant's supplemental brief in support of its motion for summary disposition, despite having promised to do so, which supplemental brief cites to caselaw that appears to be controlling, this Court deems plaintiff to have conceded defendant's entitlement to the requested relief. . . .

On January 25, 2007, plaintiff filed its motion to reconsider, amend, and/or give relief from the January 4 order. Plaintiff asserted that its response to defendant's supplemental brief was timely filed in April 2005. Plaintiff also claimed to have newly discovered evidence regarding the issue of notice that was not discovered until the morning of January 25, 2007, in the records of its own quotation department. Plaintiff indicated that the newly discovered evidence was found after it made a decision on January 24, 2007, to review its files one last time "to see if there was any further information on this issue." This allegedly new evidence was described as a lighting fixture submittal disclosing the material to be provided to Pro-Tech.

On January 30, 2007, the trial court issued an order denying as untimely plaintiff's motion to reconsider under MCR 2.119(F)(1). On February 2, 2007, plaintiff's counsel faxed a letter to the trial court requesting clarification of its order because plaintiff claimed its motion was not brought under MCR 2.119(F) but, rather, under MCR 2.611(A)(1)(f) and 2.612(C). On February 5, 2007 the trial court issued a corrected order again denying as untimely plaintiff's motion.

Plaintiff's arguments under MCR 2.611(A)(1)(f)[7] and 2.612(C)(1)(b)[8] presume that the evidence on which the motion to reconsider, amend, and/or give relief from order was based is newly discovered evidence. Black's Law Dictionary, (5th Ed.), p 940, defines "newly discovered evidence" as:

> Evidence of a new and material fact, or new evidence in relation to a fact in issue, discovered by a party to a cause of action after the rendition of a verdict or judgment therein. Testimony discovered after trial, not discoverable before trial by exercise of due diligence.

Assuming, without deciding, that plaintiff's purported newly discovered evidence is material, the alleged evidence of notice in the form of a document described as a lighting fixture submittal detailing the materials to be supplied is not newly discovered because it was in plaintiff's possession throughout the entirety of these proceedings. Plaintiff admitted that the document was in its possession all along in its quotation department. Plaintiff had February 4, 2005, until

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[7] MCR 2.611 governs new trials and amendment of judgments. Subsection (A)(1)(f) provides that a new trial may be granted on the basis of "material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at trial."

[8] MCR 2.612(C)(1)(b) provides grounds for relief from judgment and provides that a court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the ground of "newly discovered evidence which by due diligence would not have been discovered in time to move for a new trial under MCR 2.611(B)."

January 4, 2007, to discover the evidence. This evidence was clearly discoverable by exercise of due diligence before entry of the January 4, 2007, order.

Since the document plaintiff seeks to introduce is not newly discovered evidence, what remains is plaintiff's motion for reconsideration under MCR 2.119(F).

MCR 2.119(F)(1) provides:

> Unless another rule provides a different procedure for reconsideration of a decision, a motion for rehearing or reconsideration of the decision on a motion must be served and filed not later than 14 days after entry of an order disposing of the motion.

Plaintiff's motion for reconsideration was filed on January 25, 2007, more than 14 days entry of the January 4, 2007, order granting summary disposition in favor of defendant. Consequently, the trial court did not abuse its discretion in denying plaintiff's motion for reconsideration.[9]

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski
/s/ Jane M. Beckering

[9] Plaintiff also raises arguments in the discussion section of its brief regarding the propriety of the order granting defendant's motion for summary disposition. However, defendant did not raise these issues in the statement of questions presented. An issue not raised in the statement of questions presented is not preserved for appeal. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).